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Supreme Court Of The United States

OCTOBER TERM, 1938.

No. 295.

H. P. WELCH COMPANY,

Appellant,

vs.

THE STATE OF NEW HAMPSHIRE.

APPELLANT'S BRIEF

I.

Report of Opinions Below

The report and order of the Public Service Commission of New Hampshire in this case are reported in 19 N. H. P. S. C. 443; also R., *p.* 4.

The opinion of the Supreme Court of New Hampshire has not yet been officially reported, but has been unofficially reported in 199 Atlantic 886; also R., *p.* 26.

II.

Statement of the Case.

This cause comes before the Supreme Court of the United States on direct appeal, by virtue of the provisions of section 344 (a) of title 28 of the United States Code, from a decree of the Supreme Court of New Hampshire affirming an order of the Public Service Commission of the same state. The appellant alleges that a statute of The State of New Hampshire is repugnant to the Constitution and laws of the United States.

On April 13, 1937, the Public Service Commission of New Hampshire issued to the appellant, H. P. Welch Company, an

order to show cause why its common and contract carrier registrations to transport property for hire by motor vehicle between points within New Hampshire, should not be suspended or revoked because of alleged violations of *Session Laws of 1933, c.* 106, *s.* 8, limiting the hours of service of truck drivers. A hearing was held before the Commission on May 10, 1937, at which the case against the appellant was prosecuted by counsel for the appellee, The State of New Hampshire.

The appellant and appellee, with the approval of the Chief Justice of the Supreme Court of New Hampshire, have agreed that the following facts were established at this hearing. (R., *p.* 3).

The appellant is a corporation organized under the laws of Massachusetts and is engaged in both interstate and intrastate commerce as a common and contract carrier of freight by motor truck over the public highways of Massachusetts and New Hampshire. (R., *p.* 1). In 1937 the appellant, pursuant to the provisions of *Session Laws of 1933, c.* 106, *s.* 2 and 3, registered twenty trucks with the Public Service Commission for the common and contract carriage of property for hire between points within New Hampshire. (R., *p.* 1). The appellant has terminals at Boston in Massachusetts and at Manchester, Concord, and Claremont, in New Hampshire; and approximately ninety-nine percent of its business is interstate in character. (R., *p.* 1). During January, 1937, the hours of service records filed with the Commission by appellant's employee, Philip Chevrette, indicated that he had operated one of the appellant's motor trucks more than twelve consecutive hours without relief on the route between Manchester, New Hampshire and Boston, Massachusetts. (R., *pp.* 1, 2). Similar hours of service records filed by appellant's employee, Roland Rousseau, indicated that he had operated one of appellant's motor trucks more than twelve consecutive hours without relief on the "loop route" from Manchester, New Hampshire through Lawrence and Lowell, Massachusetts to Nashua, New Hampshire. (R., *p.* 2). The records also showed similar instances of continuous employment in

excess of twelve hours for appellant's employee, A. Demers, operating on the route between Manchester, New Hampshire and Boston, Massachusetts. (R., *p.* 2). In all the operations in which the alleged violations occurred interstate shipments were being carried on appellant's trucks. (R., *p.* 2). It was the practice of the appellant to carry intrastate shipments on these routes, whenever offered for carriage, but there was no specific evidence at the hearing that any intrastate shipments were being carried in the operations in which the alleged violations occurred. (R., *p.* 2).

The Commission by report filed on December 11, 1937, found the appellant guilty of violating the provisions of *Session Laws of 1933, c.* 106, *s.* 8, limiting the consecutive hours of service of motor truck drivers to twelve hours. (R., *p.* 2). The Commission ruled that the hours of service provisions of the above chapter applied to the appellant's operations in interstate commerce. (R., *pp.* 8-17). As a penalty for the alleged violations, the Commission, pursuant to the authority vested in it by *s.* 11 of the above chapter, ordered the suspension of any and all registration certificates of the appellant to transport property for hire by motor vehicle between points within New Hampshire, either as a common or contract carrier, for a period of five days. (R., *p.* 2).

The appellant thereupon seasonably moved for a rehearing which was denied December 22, 1937. (R., *p.* 2). The appellant then appealed from said report and order to the Supreme Court of New Hampshire, in accordance with the provisions of *Public Laws of New Hampshire, c.* 239. Among the grounds alleged for the appeal were the following:

> "1. The statute prescribing maximum hours of labor (Sect. 8, Ch. 106, Laws 1933) upon which said report and order are based does not apply equally to all owners and drivers of motor vehicles operated for the transportation of property on the highways of this state. It applies only to owners and drivers operating motor vehicles for the transportation of property for hire and discriminates against them by imposing burdens and restrictions which

are not applicable to other owners and operators of motor vehicles engaged in the transportation of property on the highways of this state. The statute denies to the H. P. Welch Company the equal protection of the laws guaranteed by the Bill of Rights and the Constitution of New Hampshire and by the Fourteenth Amendment to the Constitution of the United States and is of no force and effect.

"2. The alleged violations of said statute (Sect. 8, Ch. 106, Laws 1933) * * * occurred while the said H. P. Welch Company and its employees were engaged in interstate commerce. The power to regulate interstate commerce is by the Constitution of the United States (Sect. 8, Art. 1) vested in the Congress, which has exercised this power as to motor carriers engaged in interstate commerce by the 'Motor Carrier Act, 1935', which, with the regulations made pursuant thereto, supersedes said Ch. 106, as amended by Ch. 169, Laws of 1933, in so far as the provisions thereof might apply to interstate commerce." (R., *pp.* 2, 3).

The Supreme Court of New Hampshire by opinion and decree handed down June 7, 1938, dismissed the appeal. The appellant's motion for rehearing, was denied June 21, 1938. (R., p. 3).

On July 14, 1938, the appellant's petition for an appeal to the Supreme Court of the United States, pursuant to the provisions of section 344(a) of title 28 of the United States Code, was allowed by the Chief Justice of the Supreme Court of New Hampshire. The Chief Justice at the same time granted a supersedeas, suspending the execution of the order of the Public Service Commission pending the determination of the appeal.

III.

Specification of Errors.

1. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 3, 4 and 8 of chapter 106 as amended by chapter 169, *Session Laws of 1933*, do not deny to the appellant the equal protection of the laws as guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of The State of New Hampshire erred in its decision in the above entitled cause in holding that sections 8 and 11 of chapter 106 as amended by chapter 169, *Session Laws of 1933*, as applied to the appellant's operations in interstate commerce, were not superseded and rendered void by the enactment of section 304 (a) of title 49 of the United States Code.

IV.

Argument.

1. *Sections 3, 4 and 8 of Chapter 106 as amended by Chapter 169 of the Session Laws of 1933 deny to the appellant the equal protection of the laws and are repugnant to section one of the Fourteenth Amendment to the Constitution of the United States.*

Chapter 106 of the *Session Laws of 1933* was enacted to provide a comprehensive system for the regulation of motor carriers of freight for hire on the highways of New Hampshire. Under the provisions of section 2 of this chapter common carriers by motor vehicle between points within New Hampshire are required to register their motor trucks with the Public Service Commission and submit to rate regulation. Section 3 lays down the same requirements for contract carriers. Contract carriers are defined by this section as follows:

> "3. Contract Carrier Registration. The term contract carrier as used in this section shall include every person, firm or corporation transporting property for hire on any public way in this state, other than common carriers, those transporting products of their own manufacture or labor and those exempted in section 4 of this act. * * *"

Section 4 of this chapter, to the extent here relevant, provides as follows:

> "4. Exemptions. There shall be exempted from the provisions of this act:
>
> I. Motor vehicles not principally engaged in the transportation of property for hire.

> II. Motor vehicles operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or motor vehicles operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period. * * *"

Section 8 prescribes limitations on the hours of service of truck drivers and to the extent here relevant is as follows:

> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off duty. * * * The commission shall have authority to enforce the provisions of this section."

Section 11 prescribes the penalties for violations of the provisions of this chapter.

The provisions of section 8, limiting the hours of service of motor truck drivers as construed, do not apply to "those transporting products of their own manufacture or labor" nor to those motor carriers specifically exempted by section 4 of this chapter. *H. P. Welch Co.* v. *State*, —— N. H. ——; 199 A. 886; R. *p.* 28. The appellant contends that the exemption of certain classes of motor carriers from the operation of section 8 is discriminatory and denies to it the equal protection of the laws guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States.

The principles of constitutional law which are applicable to this issue do not require any great elaboration. The equal-protection clause of the Fourteenth Amendment does not preclude the states from resorting to classification for the purposes of legislation. It only requires that the classification "must be

reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Colgate* v. *Harvey*, 296 U. S. 404, 422. But discriminations are not to be supported "by mere fanciful conjecture." "They cannot stand as reasonable if they offend the plain standards of common sense." *Hartford Steam Boiler Co.* v. *Harrison*, 301 U. S. 459.

As interpreted by the Supreme Court of New Hampshire, the express purpose of section 8, limiting the hours of service of motor truck drivers, is "to protect users of the highways from the dangers likely to result to them from the operation thereon of trucks under the control of drivers suffering from fatigue." *H. P. Welch Co.* v. *State*, ——N. H. ——; 199 A. 886, 889; R., p. 30. The appellant contends that the discrimination, which is made between those motor carriers exempted from the operation of section 8 and a motor carrier such as the appellant, has no fair and substantial relation to highway safety.

Sections 3 and 4 (I) of chapter 106 exempt from the hours of service limitation persons transporting products of their own manufacture or labor and persons operating motor trucks "not principally engaged in the transportation of property for hire." By virtue of these sections the hours of service of all drivers employed by private motor carriers and "shipper-owners" are left unregulated. Nevertheless, it is a matter of general knowledge that the traffic of such motor carriers is large and that their fatigued drivers present the same hazards to the highway public as those of common and contract motor carriers, subject to section 8. Manufacturing and distributing establishments, chain stores, and wholesale and retail concerns in recent years have made increasing use of the highways for importation and exportation of supplies and products, using their own vehicles for these purposes. In 1932 the Interstate Commerce Commission estimated that, of the total freight tonnage carried by all classifications of motor trucks in the United States, fifty per cent is carried by "shipper-owners" and private carriers, as distinguished from com-

mon and contract carriers. *Re Coordination of Motor Transportation* 182 I.C.C. 263, 407. A traffic survey covering thirty-four states, prepared in 1936 for the Interstate Commerce Commission by the U. S. Bureau of Public Roads, indicated that sixty per cent of all truck drivers were employed by "shipper-owners" and private carriers. *Re Maximum Hours of Service*, 3 M.C.C. 672. In 1927 the U. S. Bureau of Public Roads published a trunkline traffic survey of New Hampshire which indicated that the use of trunkline highways by common and contract motor carriers totaled 12,700 truck-miles per day or 17.3 per cent of the total truck traffic, and that the use of the same highways by private motor carriers including "shipper-owners" totaled 60,800 truck-miles per day or 82.7 per cent of the total truck traffic. *Report of a Survey of Transportation on the State Highways of New Hampshire*, (U. S. Bureau of Public Roads, 1927) page 49. Indeed, in its biennial report to the legislature in 1934, the Public Service Commission of New Hampshire, in discussing the legislation now under review, said.

> "The line of demarcation between public and private carriers in this field is extremely tenuous * * *." *Statistical Report of the Public Service Commission*, XXIV, part 13, page 20.

These various surveys confirm what is already a matter of general knowledge, that private motor carriers and "shipper-owners" contribute a substantial part of the total truck traffic and mileage. Since a large part of the total truck traffic and mileage arises from such motor carriers, the drivers employed by such carriers present the same problems as drivers of common and contract motor carriers. Drivers of such motor carriers are just as susceptible to fatigue from long hours of employment as other truck drivers, and when fatigued constitute the same hazard to the traveling public as the fatigued truck drivers of other types of carriers. Furthermore, the profit motive which induces long hours of employment is just as prevalent among private motor carriers, including corporations "transporting

products of their own manufacture or labor", as it is among common and contract motor carriers.

The classification created by sections 3 and 4 (I) is not based upon the size of the vehicle, the weight of the load, the extent and regularity of traffic or any other factor bearing on highway safety. Instead it is based upon whether or not the load is being carried for hire under terms of common or contract carriage. If the load is not carried for hire or is a product of the carrier's own manufacture or labor, then the carrier is not subject to section 8. But if the load is carried for hire under terms of common or contract carriage, the carrier is subject to section 8. It is the appellant's contention that this classification is unconstitutional because its basis bears no fair relation to highway safety.

Section 4 (II) of chapter 106 exempts from the hours of service limitation all motor carriers, whether private, common or contract, "operating exclusively within the limits of a single city or incorporated town or within ten miles of the limits thereof or * * * operating beyond such ten-mile limit on occasional trips, not exceeding two trips in any thirty-day period." Here again it is a matter of general knowledge that the amount of truck traffic thus exempted is a substantial percentage of the total truck traffic on the public highways. The estimate of the United States Bureau of Public Roads, which has been accepted by the Interstate Commerce Commission, is that one-half of the total truck mileage in the United States arises from intra-city carriage. *Re Coordination of Motor Transportation*, 182 I. C. C. 263, 400. The drivers of motor carriers operating exclusively within cities and towns, if overworked, constitute just as much of a hazard to the traveling public as the fatigued drivers of other motor carriers; and perhaps even more of a hazard, because safe driving in city traffic requires a more alert mind.

It is therefore apparent that the classification of motor carriers found in sections 3 and 4 of the New Hampshire statute is not based upon extent or regularity of traffic, and consequently bears no relation to the purpose of the statute to promote high-

way safety. This classification is like that condemned by the Supreme Court of the United States in *Smith* v. *Cahoon*, 283 U. S. 553. That case involved a Florida statute regulating motor carriers in the interest of highway safety, but exempting from such regulation motor carriers transporting specified products. The Court said:

> "But in establishing such a regulation there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities. So far as the statute was designed to safeguard the public with respect to use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant was wholly arbitrary and constituted a violation of the appellant's constitutional rights. 'Such a classification is not based on anything having relation to the purposes for which it is made.'"

Where the class of motor carriers exempted from highway safety regulations makes only occasional use of the highways, a classification exempting it may be reasonable. A state legislature is entitled "to consider frequency and character of use and to adapt its regulations to the classes of operations which by reason of their habitual and constant use of the highways brought about the conditions making regulation imperative." *Continental Baking Co.* v. *Woodring*, 286 U. S. 352. How far a legislature "may relieve a special group of carriers on the filing of a bond for the safety of the public may depend on very different considerations, as, for instance, the extent or regularity of the traffic thus excepted." *Aero Mayflower Transit Co.* v. *Georgia Public Service Commission*, 295 U. S. 285. However, in the case at bar "the extent and regularity" of the motor carrier traffic exempted from the operation of the hours of service limitation is generally known to be large in proportion to the extent and regularity of all motor carrier traffic.

In the opinion delivered in the court below, affirming the validity of the classification in the New Hampshire statute, reliance was placed on the cases of *Bekins Van Lines* v. *Riley*, 280 U. S. 80; *Alward* v. *Johnson*, 282 U. S. 509; *Continental Baking Co.* v. *Woodring*, 286 U. S. 352; *Sproles* v. *Binford*, 286 U. S. 374; and *Hicklin* v. *Coney*, 290 U. S. 169. But those cases are not in point, for in all of them the exemption of a certain class of motor carriers from highway safety regulations was held valid because the classes of carriers exempted made infrequent use of the highways. In the case at bar the classes of motor carriers exempted from regulation are generally known to make constant and extensive use of the highways.

The appellant respectfully submits that the classification of motor carriers contained in sections 3 and 4 of chapter 106, *Sessions Laws of 1933*, is arbitrary and unreasonable and denies to the appellant the equal protection of laws guaranteed by section one of the Fourteenth Amendment to the Constitution of the United States. There is "no fair reason for the law which would not require with equal force its extension to others whom it leaves untouched." *Watson* v. *Maryland*, 218 U. S. 173.

2. *Sections 8 and 11 of Chapter 106 as amended by Chapter 169 of the Session Laws of 1933, as applied to interstate commerce, are inoperative, having been superseded by the "Motor Carrier Act of 1935."*

Section 8 of chapter 106, *Session Laws of 1933*, reads, to the extent here relevant, as follows:

> "8. Hours of Service. It shall be unlawful for any driver to operate, or for the owner thereof to require or permit any driver to operate, any motor vehicle for the transportation of property for hire on the highways of this state when the driver has been continuously on duty for more than twelve hours, and after a driver has been continuously on duty for twelve hours it shall be unlawful for him or for the owner of the vehicle to permit him to operate any such motor vehicle on the highways of this state until he shall have had at least eight consecutive hours off

duty. * * * The commission shall have authority to enforce the provisions of this section."

Section 11 of chapter 106 prescribes penalties for violation of the chapter and more particularly provides as follows:

"11. Revocation. The commission shall have authority, after notice and hearing, to suspend or revoke any registration certificate issued in accordance with the provisions of this act for violation of the provisions of this act."

In 1935 the Congress of the United States enacted the so-called "Motor Carrier Act of 1935" (49 U.S.C., ss. 302-327) which placed the field of interstate motor carriers under the jurisdiction of the Interstate Commerce Commission. By the provisions of this act (49 U.S.C., s. 304a), the Interstate Commerce Commission is given the following power and duty:

"304(a). Powers and duties generally. It shall be the duty of the Commission— (1) To regulate common carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees * * * (2) To regulate contract carriers by motor vehicle as provided in this chapter, and to that end the Commission may establish reasonable requirements with respect to * * * qualifications and maximum hours of service of employees * * *."

The Interstate Commerce Commission upon its own motion began an investigation of the maximum hours of service of motor carrier employees by order dated July 30, 1936. This investigation extended over nearly eighteen months, and on December 29, 1937, the Commission issued its first regulations on the subject, to take effect July 1, 1938. The Commission ruled that its authority over hours of service was limited to matters concerned with highway safety. *Re Maximum Hours of Service*, 3 M.C.C. 665. The whole proceeding was reopened by order of the Commission, dated April 4, 1938, and a second report and order were issued on July 12, 1938, postponing the effective date of these

regulations until October 1, 1938. *Re Maximum Hours of Service,* 4 M.C.C.——. On September 26, 1938, the proceeding was again reopened for further hearing, and the Commission postponed the effective date of the hours of service regulations for common and contract carriers of property until December 31, 1938. *Re Maximum Hours of Service,* 5 M.C.C.——. It is here that the matter now rests.

The alleged violations by the appellant of the New Hampshire statute limiting the hours of service of truck drivers occurred in 1937 (R., *p.* 1). There were in effect at that time no regulations of the Interstate Commerce Commission pertaining to the maximum hours of service of motor carrier employees, although as indicated above the Commission then had that subject under investigation.

At the hearing before the Public Service Commission of New Hampshire in May, 1937, the appellant's truck drivers, Chevrette and Demers, were shown to have driven on several occasions for more than twelve consecutive hours without relief, while operating appellant's trucks on the route between Boston, Massachusetts and Manchester, New Hampshire. (R., *pp.* 1, 2). The appellant's driver, Rousseau, was also shown to have exceeded the limit placed upon continuous hours of service by section 8 of chapter 106, while operating on the "loop route" so-called, from Manchester, New Hampshire through Lawrence and Lowell, Massachusetts to Nashua, New Hampshire. (R., *p.* 2). In all these operations by appellant's drivers, Chevrette, Rousseau and Demers, interstate shipments were being carried on board the trucks. (R., *p.* 2).

It is apparent, therefore, that all the operations in which the alleged violations of section 8 of chapter 106, *Session Laws of 1933,* occurred, constituted interstate commerce. The routes traveled were interstate in character, and interstate shipments were being transported. There was no specific evidence that any intrastate shipments were being carried at the time when the alleged violations occurred, although it was customary for the appellant to carry occasional intrastate shipments over parts

of its interstate routes. (R., *p.* 2). However, even if some intrastate shipments were being carried at the time when the alleged violations occurred, the situation would not be altered. On this point the case of *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, is decisive. In that case a train was carrying both interstate and intrastate freight, and the question before the Court was whether the federal or the Washington hours of service act applied to the train crew. The Court said,

> "This transportation was interstate commerce, and the train was an interstate train, despite the fact that it may also have been carrying some local freight. In view of the unity and indivisibility of the service of the train crew and the paramount character of the authority of Congress to regulate commerce, the act of Congress was exclusively controlling."
>
> To the same effect, see *Baltimore & Ohio R. Co.* v. *Interstate Commerce Commission,* 221 U. S. 612.

However, despite the interstate character of these operations of appellant's motor trucks, the Public Service Commission of New Hampshire held that section 8 of the New Hampshire statute was applicable and had been violated. The New Hampshire Commission further decided that the enactment by Congress of the "Motor Carrier Act of 1935" had not disturbed its own authority, because the Interstate Commerce Commission had not, at the time when the alleged violations occurred, exercised its power to prescribe maximum hours of service for employees of interstate motor carriers. *Re H. P. Welch Company,* 19 N.H.P.S.C. 443, 455, 456; R. *pp.* 8-17.

In the Supreme Court of New Hampshire, the same view of law was taken. The Court said,

> "Upon the authority of the cases last cited we hold that it was not the intention of Congress to enter the field of regulation of hours of service of truckdrivers engaged in interstate commerce until the effective date of the Interstate Commerce Commission's rulings upon the subject." *H. P. Welch Co.* v. *State,*——N. H.——; 199A. 886, 892; R., *p.* 34.

The appellant contends that the enactment of the "Motor Carrier Act of 1935", in and of itself, served to supersede and render inoperative section 8 of the New Hampshire statute, so far as it purported to regulate the hours of service of motor truck drivers engaged in interstate commerce. The "Motor Carrier Act of 1935" recognized the necessity for Federal regulation of hours of service of employees of interstate motor carriers and gave the Interstate Commerce Commission complete jurisdiction over that subject. After the enactment of the Motor Carrier Act, no regulation of hours of service prescribed by any other authority could be effective to regulate motor carriers of interstate commerce. The fact that the Interstate Commerce Commission had not seen fit to exercise its authority at the time when the alleged violations of the New Hampshire act occurred, has no bearing upon the construction of the "Motor Carrier Act of 1935". That act was intended to occupy the field of regulation of hours of service of truck drivers engaged in interstate commerce. The wide scope of authority over motor carriers, conferred on the Interstate Commerce Commission leads to the conclusion that its jurisdiction in this field was intended to be exclusive. The enactment of the Motor Carrier Act was intended to clear the field of all state legislation inconsistent with that act, thus leaving the Interstate Commerce Commission with authority to act in any way that the public welfare directed. Thus if the Commission, after investigation, concluded that no regulation of hours of service in the interstate motor carrier industry was desirable, its conclusion could easily be made effective.

The "Motor Carrier Act of 1935" confers jurisdiction over interstate motor carriers upon the Interstate Commerce Commission, in the following words:

> "(b) The provisions of this chapter apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation; and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission." (49 U.S.C. *s.* 302b).

The language of this section explicitly confers exclusive power over interstate motor carriers upon the Interstate Commerce Commission. The next section of the act (49 U.S.C., s. 302c) makes exceptions in favor of state authority, in the following words:

> "(c) Nothing in this chapter shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof."

Still another section of the act (49 U.S.C., s. 316e) makes a further exception in favor of state authority, as follows:

> "Provided, however, That nothing in this chapter shall empower the Commission to prescribe, or in any manner regulate, the rate, fare, or charge for intrastate transportation, or for any service connected therewith, for the purpose of removing discrimination against interstate commerce, or for any other purpose whatever."

In only these two sections of the "Motor Carrier Act of 1935" did Congress manifest any intention of preserving the authority of the states. Therefore these two sections mark the limits of state power over interstate motor carriers, for the presumption is that if Congress had intended, in addition, to preserve state authority over the maximum hours of service of employees of interstate motor carriers until the effective date of the Interstate Commerce Commission's regulations of that subject, it would have plainly said as much. *United States* v. *Hubbard*, 266 U. S. 474, 479, 480. Indeed, in the debates on this act in the United States Senate, an amendment was rejected which would have expressly affirmed the power of the states to enact highway safety regulations, not discriminatory against interstate commerce, for all motor carriers (79 Congressional Record, part V, pages 5735, 5737).

There is, moreover, another compelling reason why Congress must have intended the enactment of the "Motor Carrier Act of

1935" to supersede all state regulations of the maximum hours of service of employees of interstate motor carriers. By the provisions of the Motor Carrier Act, the Interstate Commerce Commission is given the power to regulate the rates of interstate motor carriers; and all such carriers are required to file tariffs with the Commission (49 U.S.C., ss. 316, 317). Regulation of the maximum hours of service of employees of motor carriers has a direct bearing upon the cost of operations in that industry. There is no uniformity in the laws of the several states regulating hours of service of motor carrier employees. If the diverse state laws were allowed to control the hours of service in the interstate motor carrier industry after the enactment of the Federal Motor Carrier Act, fair regulation of the rates of such interstate motor carriers would be exceedingly difficult, for the costs of operation of such carriers would vary from state to state. It is evident, therefore, that Congress intended to establish uniformity of regulation in the interstate motor carrier industry and, to that end, vested complete authority over all phases of that industry in the Interstate Commerce Commission.

The case of *Northern Pacific Railway Co.* v. *Washington,* 222 U. S. 370, is almost directly in point with the case at bar. That case concerned the Federal hours of service act for railway employees (34 Stat. at L. 1415) which was approved March 4, 1907, with the proviso that it should not take effect until one year after its passage. In July, 1907, the Northern Pacific Railway permitted some of its employees, engaged in interstate commerce within the State of Washington, to remain on duty in excess of the sixteen hour limit established by a Washington statute. Action was thereupon instituted in the Washington courts to assess a penalty against the defendant railroad. In reversing the decision of the Washington Supreme Court, the Supreme Court of the United States held that the defendant was not subject to regulation by the state, because Congress had asserted its exclusive authority by its enactment relating to the hours of service of railway employees. The fact that the act of Congress had not taken effect at the time when the alleged viola-

tion of the Washington statute occurred was held to make no difference. The Court said,

> "We are of opinion that this view is not compatible with the paramount authority of Congress over interstate commerce. It is elementary * * * that the right of a state to apply its police power for the purpose of regulating interstate commerce in a case like this exists only from the silence of Congress on the subject, and ceases when Congress acts on the subject or manifests its purpose to call into play its exclusive power. This being the conceded premise upon which alone the state law could have been made applicable, it results that as the enactment by Congress of the law in question was an assertion of its power, by the fact alone of such manifestation that subject was at once removed from the sphere of the operation of the authority of the State."

See also, *Erie Railway Co.* v. *New York*, 233 U. S. 671.

Another case directly in point with the case at bar is that of *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605. That case concerned the Federal Locomotive Boiler Inspection Act (43 Stat. at L. 659) under which the Interstate Commerce Commission was given authority to prescribe regulations concerning the equipment of locomotives. The Supreme Court of the United States held that the Federal act precluded the enforcement of a Georgia statute prescribing an automatic door for locomotive fire-boxes, even though the Interstate Commerce Commission had as yet issued no regulations concerning locomotive fire-box doors. The Court said,

> "The fact that the commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of authority conferred upon the commission leads to that conclusion. Because the standard set by the commission must prevail, requirements by the states are precluded, however commendable or however different their purpose."

A parallel question was presented in the case of *Oregon-Washington Railroad and Navigation Co.* v. *Washington*, 270 U. S. 87. In that case the State of Washington undertook to establish a quarantine upon plants and animals shipped in interstate commerce. The Supreme Court of the United States held that by act of Congress, the exercise of the power of quarantine was vested in the United States Secretary of Agriculture and that state quarantine legislation was thereby precluded. The Court further said,

> "It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act, there is no invalidity in state action. Such construction as that cannot be given to the Federal statute. The obligation to act, without respect to the states, is put directly upon the Secretary of Agriculture whenever quarantine in his judgment is necessary. When he does not act it must be presumed that it is not necessary. With the Federal law in force state action is illegal and unwarranted."

To the same effect see *Missouri R. R. Co.* v. *Porter*, 273 U. S. 341, and *L. & L. Freight Lines* v. *Railroad Commission*, 17 Fed. Supp. 13, 15.

In its report of this case below, the Public Service Commission of New Hampshire emphasized the argument that if the appellant's contention was accepted, the field of hours of service in interstate motor transportation would be left unregulated. The answer to this argument is not difficult to suggest, for as Mr. Justice Brandeis said in *Napier* v. *Atlantic Coastline Railroad Co.*, 272 U. S. 605, 613,

> "If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample."

In the opinion delivered below, the Supreme Court of New Hampshire relied on the cases of *Missouri Pacific Railway Co.* v. *Larabee Mills*, 211 U. S. 612, and *Northwestern Bell Telephone Co.* v. *Nebraska*, 297 U. S. 471, as authority for the proposition

that the enactment of the "Motor Carrier Act of 1935" did not render inoperative the sections of the New Hampshire statute now under review. The first of these cases, *Missouri Pacific Railway Co.* v. *Larabee Mills*, was virtually overruled in the case of *Oregon—Washington Railroad and Navigation Co.* v. *Washington*, 270 U. S. 87 at 102. The second of these cases, *Northwestern Bell Telephone Co.* v. *Nebraska*, is scarcely in point. That case involved the power of a state to establish depreciation rates for the property of a telephone company pursuant to the regulation of intrastate telephone rates. It was held that the state had such power even though the Interstate Commerce Commission had been given authority to establish depreciation rates over some of the same property in furtherance of the regulation of interstate telephone rates. The main point of difference between that case and the one at bar is that in the former the state was attempting to regulate intrastate commerce over which its authority was plain, while in the latter the state is attempting to regulate interstate commerce.

The appellant respectfully submits that sections 8 and 11 of chapter 106, *Session Laws of 1933*, as applied to interstate commerce, are inoperative, having been superseded by the "Motor Carrier Act of 1935"; and that consequently the decree of the Supreme Court of New Hampshire in this case ought to be reversed.

Respectfully submitted,

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